

# VULNERABILITY IN THE MICROSYSTEM OF CONSUMER LAW

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## *Abstract*

The paper examines the centrality of vulnerability in the microsystem of protection of consumers and users, understood as a legal category that articulates equality, equity and dignity. This sector of private law has become the most dynamic space for the protection of people in structurally disadvantaged situations, by explicitly recognizing the inherent power asymmetries of the market and promoting differentiated mechanisms aimed at restoring real conditions of equality. The article analyzes the constitutional, international, supranational, and comparative evolution of this principle, showing how various legal systems raise equitable treatment and the prohibition of discrimination to higher levels of legal protection. Likewise, the Argentine normative construction is examined, in which the defense of consumers incorporates a human rights perspective and expands the scope of the antidiscrimination principle. The study also highlights the regional expansion of norms that prohibit abusive and discriminatory practices, and that require objective, deferential and inclusive conduct by providers. It is pursued to demonstrate that vulnerability constitutes a structural normative axis for the contemporary understanding of consumer law and a central instrument for the reinforced protection of groups traditionally relegated. The novelty lies in the study of vulnerability in this orbit of Private Law, and not only in the traditional field of human rights.

## *Keywords*

Vulnerability. Consumer. Microsystem. Market. Rights. Human rights.

## *Summary*

Introduction: the right to fair treatment. 1. Constitutional Anchoring. 2. International Human Rights Law. 3. International scope of consumers. 4. National consumer protection legislation 5. Regional comparative law. References

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## INTRODUCTION: THE RIGHT TO FAIR TREATMENT

The Consumer Protection System is more in line with postmodernity and the pursuit of human rights than the Civil System in general. It is more consistent with the right to equality, solidarity, and equity. Perhaps this is the reason for the suggestive spread of Consumer Law, which has come to govern areas of vacancy in Private Law.

The protection of the weakest in Private Law was carried out especially in the consumer protection microsystem, which became the laboratory for the protection of the vulnerable. Consumer Law is to the evolution of equality in Private Law what Gender Law is to Public Law.

In this microsystem, vulnerability is expressed in the form of the right to equity<sup>2</sup> and human dignity<sup>3</sup>.

<sup>4</sup>In the sphere of consumption, due to the natural divergence of power and opportunity between suppliers and consumers<sup>5</sup>, and due to the structural economic and informational vulnerability that weighs on the latter, the guarantee of equality requires a more rigorous standard, which is only satisfied if there is "real isonomy," where "commercial relations between suppliers and consumers and users are established on the basis of equal treatment for equals and unequal treatment for unequals."

The right to equal treatment therefore includes the prohibition of negative discrimination<sup>6</sup> and the promotion of positive discrimination. In the latter sense, benefits are granted to certain groups in order to restore equal

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<sup>2</sup> Equity can have various functions: as a value, general principle, guideline for interpretation and integration, subjective right, among others (*See* QUAGLIA 2006, 903).

<sup>3</sup> "Equality and non-discrimination stem from the idea of unity of dignity" (Advisory Opinion OC-4/84 of January 11, 1984, Proposed amendment to the Political Constitution of Costa Rica related to naturalization, paragraph 56).

<sup>4</sup> QUIROGA LAVIÉ, BENEDETTI and CENICACELAYA 2001,318.

<sup>5</sup> Constitutional Court of Peru, January 17, 2005, "Agua Pura Rovic S.A.C.," file no. 3315-2004-AA/TC, fj 9, c.

<sup>6</sup> ALTERINI 2016, 627.

opportunities in the fight against inequalities<sup>7</sup> and achieve inclusion. This positive aspect is a particularly useful tool for addressing situations of hyper-vulnerability<sup>8</sup>. The causes of negative discrimination are analogous to the categories that justify the overprotection of the hyper-vulnerable: minors, women, people with disabilities, people with special dietary needs, older adults, indigenous peoples, tourists, e-consumers, religious minorities, etc.<sup>9</sup>. Although these are two sides of the same coin, the lines are not always easy to draw. In one case, a tourism services company was sued for applying differential rates to foreign users when selling tickets for city tours. The lawsuit was dismissed, emphasizing the fact that there was no "special rate" for foreigners, but rather a "promotional rate" for pensioners and retirees "residing" in Argentina and for "residents" of the City of Buenos Aires. For those judges, the practice actually constituted "positive discrimination"<sup>10</sup>. We agree with the criticism of the precedent's solution taught by Hernández and Frustagli<sup>11</sup>.

On another note, gray areas can also arise when possible negative discrimination conflicts with security reasons. For example, the case of "disruptive passengers" on airlines<sup>12</sup> or "hooligans" in stadiums<sup>13</sup>. Or with well-founded economic reasons, cruise ships or *all-inclusive* hotels that refuse children.

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<sup>7</sup> Following AZAR-BAUD 2015, 74.

<sup>8</sup> MENDIETA 2018, 95.

<sup>9</sup> Following the research of Sebastián BAROCELLI, in his work: *Hypervulnerable Consumers*, El Derecho, Buenos Aires, 2018, where all the reasons stated are analyzed separately.

<sup>10</sup> CNCom., Chamber C, 10/14/2014, "Southern Common Market Consumer Protection Association v. DERUDDER Hermanos-Rotamund UTE s/sumarísimo."

<sup>11</sup> See the commentary on the ruling by: HERNÁNDEZ 2015, 618. The subject can also be explored in greater depth in AZAR-BAUD 2015, 74.; VALICENTI, Ezequiel, "Equality in consumer relations. Protection against consumer discrimination 2017, 942; PÉREZ HAZAÑA 2014, 89.

<sup>12</sup> See Court of Appeal of Santiago (Chile), Chamber 2, 12/18/2013, "I.M.R.C. v. Aerolíneas Argentina SA," LL 2014-B-178.

<sup>13</sup> Cf. CHAMATROPULOS 2016, 350.

## CONSTITUTIONAL ANCHORING

The principle of equity in consumer law has reached the highest level in certain systems.

This is the case in Costa Rica, where the right of consumers to fair treatment is considered fundamental (Art. 46). More programmatically, Art. 76 of the Constitution of Poland (1997) protects consumers against abusive practices, which include unfair or discriminatory practices. More elliptically, Article 170 of the Brazilian Constitution states that: "The economic order... aims to ensure a dignified existence for all, in accordance with the dictates of social justice, observing the following principles: ... IV free competition; V consumer protection; VI environmental protection; VII reduction of regional and social inequalities...".

The most paradigmatic positive enshrinement of a subjective right<sup>14</sup>, fundamental to conditions of equitable (and dignified<sup>15</sup>) treatment, is represented by Article 42<sup>16</sup> of the Argentine Constitution, which designs an innovative formula of mixture containing two linked and complementary principles: equity and dignity<sup>17</sup>. It is similarly enshrined in several provincial constitutions: Chaco (Article 47), Formosa (Article 74), Neuquén (Article 55), and Salta (Article 31).

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<sup>14</sup> SCHIAVI, María V., "El consumidor y los supermercados" (Consumers and Supermarkets), *Revista de Responsabilidad Civil y Seguros (Civil Liability and Insurance Magazine)*, vol. IV, La Ley, Buenos Aires, 2013, pp. 67 et seq. See also ÁLVAREZ LARRONDO 2012, 613 et seq.

<sup>15</sup> To corroborate this strong link, it suffices to note that, for the Inter-American Court of Human Rights, the notion of equality is inseparable from that of dignity (*cf.* ROUSSET SIRI 2016, 8, at [www.revistaryd.derecho.uncu.edu.ar](http://www.revistaryd.derecho.uncu.edu.ar)).

<sup>16</sup> The first paragraph of Article 42 states: "Consumers and users of goods and services have the right, in consumer relations... to fair and dignified treatment."

<sup>17</sup> *Cf.* WAJNTRAUB 2014, 843.

The explicit enshrinement of this original combination<sup>18</sup> in Article 42 is complemented by the provision contained in Article 43, which stands as a clear demonstration of opposition to all forms of discrimination<sup>19</sup>.

## INTERNATIONAL HUMAN RIGHTS LAW

As we have anticipated, among the human rights treaties with constitutional status in our country, various norms guarantee—with different scopes—conditions of equal and non-discriminatory treatment: Article II of the American Declaration of the Rights and Duties of Man (ADRDMD); Articles 1.1 and 24 of the American Convention on Human Rights (ACHR); the preamble and Articles 1, 2, and 7 of the Universal Declaration of Human Rights (UDHR); Articles 2.2, 7, and 10.3 of the International Covenant on Economic, Social, and Cultural Rights (ICESCR); and Articles 2.1, 4.1, 14, 20, 24.1, 25, and 26 of the International Covenant on Civil and Political Rights (ICCPR).

This is particularly relevant in the Argentine model, since, although consumer protection is not explicitly enshrined in human rights law, it is reasonable to extrapolate the latter system to consumer interests<sup>20</sup>, with the right to fair (and dignified) treatment being one of the main cornerstones of this juxtaposition<sup>21</sup>.

Beyond this connection, the principle of non-discrimination, regulated in the conventional order, extends to the enjoyment of all rights granted by

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<sup>18</sup> The Argentine Supreme Law has the merit of being the first to harmoniously combine dignity and equity (KEMELMAJER DE CARLUCCI 2015, 237 et seq. Similarly: CORTI and IORIO 2014, 4; SIGAL 2014, 2022).

<sup>19</sup> Furthermore, equality in general is guaranteed in Articles 16, 42, and 75(23) of the Argentine Constitution.

<sup>20</sup> SAHIAN 2017, 483 et seq.

<sup>21</sup> SAHIÁN 2018, 1-7.

national law, and not only international law<sup>22</sup>, as a consequence of the principle of complementarity.

## INTERNATIONAL SCOPE OF CONSUMERS

The United Nations General Assembly, through its resolution of December 22, 2015<sup>23</sup>, promoted innovative reforms in the area of consumer protection<sup>24</sup>. In relation to the purposes at hand, Article 11 (point IV) regulates a series of "principles for good commercial practices," among which the following stand out: fair and equitable treatment (subsection a) and prohibition of illegal, unethical, discriminatory, or deceptive practices (subsection b).

Particularly noteworthy is the requirement that policies to promote sustainable consumption must take into account the following objectives: the eradication of poverty, the satisfaction of the basic human needs of all members of society, and the reduction of inequality, both within and between countries (Article 7).

It was agreed that this resolution sets a desirable minimum standard of protection to which countries should aspire<sup>25</sup>. Although *soft law*, these provisions take on particular importance in the context of the dialogue between sources now encouraged by the Civil and Commercial Code<sup>26</sup>.

<sup>22</sup> See Inter-American Court of Human Rights, Advisory Opinion OC 18/03 of 09/17/2003, Legal Status and Rights of Undocumented Migrants, Series A No. 18, paragraph 88.

<sup>23</sup> A/RES/70/186. Seventieth session, agenda item 18 (a), on the basis of the report of the Second Committee (A/70/470/Add.1)]. 81st plenary meeting.

<sup>24</sup> Thus, among the general principles (point III.5), it states, in relation to our current interest, that: "... the legitimate needs that the guidelines seek to address are as follows: (a) Consumer access to essential goods and services; (b) Protection of consumers in vulnerable and disadvantaged situations... f) Consumer education, including education on the environmental, social, and economic consequences of their choices...".

<sup>25</sup> Tambussi even argues that: "... *beyond their low status as guidelines (they are not treaties), they constitute postulates from which domestic legislation cannot deviate.*" (TAMBUSSI 2005, 34).

<sup>26</sup> BAROCELLI 2016, 15.

Certain General Comments of the Committee on Economic, Social and Cultural Rights are also noteworthy. Thus, General Comment 4 (right to adequate housing), 12 (right to adequate food), 13 (right to education), 14 (right to the highest attainable standard of health), and 15 (right to water), where respect for dignity and non-discrimination are the common denominators. These General Observations serve precisely to give substance to consumer rights<sup>27</sup>.

The Charter of Fundamental Rights of the European Union, in a very comprehensive Title III entitled "Equality," extensively regulates the principle of non-discrimination in Article 21<sup>28</sup>, supplemented by rules on equality before the law (Article 20); cultural, religious, and linguistic diversity (Article 22); equality between women and men (Article 23); the rights of the child (Article 24); the rights of older persons (Article 25); and the integration of persons with disabilities (Article 26). This Charter is unique in including consumer protection in its catalog in Article 38, which, as mentioned above, is unusual in this type of treaty.

In our region, the "Presidential Declaration of Fundamental Rights of Mercosur Consumers" of Florianópolis of December 15, 2000, stated that consumer protection encompasses various fundamental rights. In this regard, the following rights were set forth: the right to balance in consumer relations, ensuring respect for the values of dignity and loyalty, based on

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<sup>27</sup> COURTIS 2008, 390 and 391.

<sup>28</sup> "1. All discrimination is prohibited, particularly that based on sex, race, color, ethnic or social origin, genetic characteristics, language, religion or beliefs, political or other opinions, membership in a national minority, property, birth, disability, age, or sexual orientation. 2. Any discrimination on grounds of nationality is prohibited within the scope of application of the Constitution and without prejudice to its specific provisions." Paragraph 1 is based on Article 13 of the European Community Treaty, now replaced by Article 19 of the Treaty on the Functioning of the European Union, Article 14 of the ECHR (referred to *above*) and Article 11 of the Convention on Human Rights and Biomedicine. Paragraph 2 corresponds to the first paragraph of Article 18 of the Treaty on the Functioning of the European Union.

good faith (subsection b); and the right to access consumption with freedom of choice, without discrimination or arbitrariness (subsection d); assuming the commitment to "progressively" harmonize the respective legislations.

### NATIONAL CONSUMER PROTECTION LEGISLATION

The "multi-faceted" prerogative of fair and dignified treatment<sup>29</sup> was incorporated into the Consumer Protection Law in Article 8 bis, with the reform introduced by Law 26,361, as one of the most significant contributions of this legislative amendment<sup>30</sup>.

For its part, in the Civil and Commercial Code, the regulation of fundamental rights to fair (and dignified) treatment was consummated within the framework of abusive practices<sup>31</sup>. In addition to regulating dignified treatment (1097) and freedom of contract (1099), the codifier regulated the right to fair and non-discriminatory conditions in Article 1098<sup>32</sup>. This "axis" of dignity, fairness, and non-discrimination is established as the essential way in which the provider must behave<sup>33</sup>. The Code indisputably anchors consumer protection in the concepts of human rights law<sup>34</sup>, essentially based on the principle of non-discrimination. This approach has been proclaimed in the Fundamentals of the Draft Code, which states that: "*...it seeks real equality and develops a series of rules aimed at*

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<sup>29</sup> The link is justified since discriminatory acts in consumption inherently affect the dignity of individuals (Cf. AMAYA AYALA 2017, 24).

<sup>30</sup> Thus: QUAGLIA 2011, 50.

<sup>31</sup> See ARIAS 2017, 26 and especially 31.

<sup>32</sup> Art. 1098: "Fair and non-discriminatory treatment. Suppliers must treat consumers fairly and non-discriminarily. They may not establish differences based on guidelines contrary to the constitutional guarantee of equality, in particular that of the nationality of consumers."

<sup>33</sup> CURÁ 2014, 59.

<sup>34</sup> STIGLITZ 2015, 312; STIGLITZ 2014, 137 et seq.; TAMBUSI 2017, 49; VIEIRA 2013, 1 et seq.

*establishing a true ethic of the vulnerable*<sup>35</sup> ... without discrimination."

On this point, the digest has the merit of extrapolating to the field of consumption the jurisprudence of the Inter-American Court of Human Rights, which proclaims that there is an indissoluble link between the obligation to respect human rights and the principles of equality and non-discrimination<sup>36</sup>.

## REGIONAL COMPARATIVE LAW

The principle of non-discrimination is in force in most regional legislation. Chile's Law 19.496 of 1997 recognizes as a basic right of consumers: "not to be arbitrarily discriminated against by suppliers of goods and services" (Art. 3 lit. c).

In Uruguay, Law 17,250 of 2000, in its art. 6, sets out the basic rights of consumers, which include: "Education and information on the proper consumption of products and services, freedom of choice, and equal treatment when contracting" (inc. B).

Paraguay establishes in Article 6 of Law 1334/98 that basic consumer rights include, among others, "adequate education and dissemination of information on the characteristics of products and services offered on the market, ensuring consumers freedom of choice and fairness in contracts"

<sup>35</sup> The expression "ethics of the vulnerable" is taken by Lorenzetti from Pope Francis' Second Encyclical "*Laudato si'*." (See Lorenzetti's commentary "*Laudato si, on the care of our common home*" at <http://www.infobae.com/2015/06/22/1736853-francisco-y-la-etica-los-vulnerables>).

<sup>36</sup> Inter-American Court of Human Rights: February 24, 2012, "Atala Riffo and daughters v. Chile," Merits, Reparations, and Costs. Series C No. 239, para. 78; October 24, 2012, "Nadege Dorzema et al. v. Dominican Republic." Merits, Reparations, and Costs. Series C No. 251, para. 224; 03/19/2014, "Veliz Franco et al. v. Guatemala." Preliminary Objections, Merits, Reparations, and Costs. Series C No. 277, para. 204; 11/30/2016, "I.V. v. Bolivia." Preliminary Objections, Merits, Reparations, and Costs. Series C No. 329, para. 239; October 20, 2016, "Workers of the Hacienda Brasil Verde v. Brazil." Preliminary Objections, Merits, Reparations, and Costs. Series C No. 318, para. 335.

(lit. c). In the same legislative body, Article 14 prohibits suppliers from: "... f) discriminating against consumers on the basis of sex, age, religion, race, or economic status in the provision of a product or service offered to the general public." Likewise, with regard to advertising (Article 37), it states that "abusive advertising, understood as advertising of a discriminatory nature of any kind, is prohibited."

The Brazilian Consumer Protection Code (Law 8078 of 1990) recognizes in Article 6 that the following are basic consumer rights: "II. Education and dissemination of information on the proper consumption of products and services, ensuring freedom of choice and equality in contracting." Article 37 prohibits all misleading or abusive advertising, specifying in paragraph 2 that "discriminatory advertising of any nature is considered abusive." And Article 39 condemns certain abusive discriminatory practices<sup>37</sup>.

In Bolivia, Law 453 of 2013 has a Section IV on the Right to Fair Treatment, in which Article 17 provides that consumers have the right to fair treatment. It also stipulates that suppliers must use objective and non-discriminatory criteria when offering products or services. Article 23 lists abusive commercial practices, including discriminatory acts or conduct in relation to access to products or services (lit. e). Article 40 sets out the duties of suppliers, which include providing service to consumers without discrimination, with respect, warmth, and cordiality (lit. c) and supplying products or services under conditions of quality, equality, equity, accessibility, and without interruption (lit. d). Article 5 defines abusive advertising as discriminatory advertising or information (section 9).

Ecuador's Law 21 of 2000 recognizes as fundamental (Article 4) the right to transparent, equitable, and non-discriminatory or abusive treatment by

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<sup>37</sup> "The following abusive practices are prohibited: ... Taking advantage of the consumer's lack of knowledge or ignorance, taking into account their age, health, knowledge, or social condition, to impose products or services on them ... Disseminating derogatory information regarding an act performed by the consumer in the exercise of their rights ...". *Ibid.* Art. 14 b and c of the Paraguayan Law.

suppliers of goods or services (paragraph 5).

Colombia's Law 1480 of 2011 provides in Article 3 for the right of consumers and users to equality, that is, to be treated fairly and in a non-discriminatory manner (paragraph 1.12).

Article 8, paragraph 9, of Venezuela's 2010 Law, in relation to goods and services declared or not declared to be of basic necessity, guarantees the right not to receive discriminatory treatment from suppliers. Article 16 prohibits any act or conduct that imposes abusive conditions on individuals, such as: "1. The unjustified application of unequal conditions for the provision of goods or services, which places individuals at a disadvantage compared to others. 2. The unjustified application of unequal conditions for the provision of goods or services based on the means of payment. (...) 6. Discriminatory conduct."

Peru's 2010 Consumer Protection and Defense Code establishes, among the basic rights of consumers, the right to fair and equitable treatment and not to be discriminated against on the basis of origin, race, sex, language, religion, opinion, economic status, or any other factor (lit. d of numeral 1.1. of Article 1). Article 38 provides for a general prohibition of discrimination. It also prohibits the exclusion of persons without reasons related to the security of the establishment or the peace of mind of its customers or other similar reasons. It establishes that different treatment must be based on objective and reasonable grounds. It clarifies that the selection of customers may be carried out to the extent that a different factual situation is verified (such as when preference is given at bank counters because of being a customer), and there must be proportionality. Article 39 emphasizes that the existence of unequal treatment must be proven, while the provider must prove that they carried out an act of exclusion for reasons of security of the establishment or peace of mind of its customers or establishment or other similar reasons, or that the selection or preferential treatment of customers was due to objective and reasonable causes.

As can be seen, the principle of non-discrimination is widespread in consumer protection microsystems in the region.

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